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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1086

EDWARD KERR, Police Director, City of Newark (on leave) and ANTHONY BARRES, Acting Police Director, City of Newark and the CITY OF NEWARK,

Petitioners,

vs.

RONALD GASPARINETTI, and POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL NO. 3,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Counter-Statement of Facts

Ronald Gasparinetti, Respondent, is a police officer with the Police Department of the City of Newark. He is also the President of Patrolmen's Benevolent Association Local No. 3 (hereinafter referred to as "P.B.A."). Respondent P.B.A. is the exclusive collective bargaining agent for all police officers who are employed by the Newark Police Department.

The Petitioners are Edward Kerr, the Acting Police Director of Newark's Police Department, and Anthony Barres, Newark's Chief of Police.

The publicized statements of Ronald Gasparinetti (Appendix at 1a-3a), which are the subject of this action were made in reference to a series of incidents which took place in the City of Newark beginning in early 1973. Those incidents arose out of a public controversy over the construction of Kawaida Towers, a proposed low-income housing project located in the predominantly white North Ward of the City of Newark. Opponents of the project formed picket lines around the construction site of the project and violence broke out between the proponents and the opponents of Kawaida Towers. Newark policemen assigned to the site were injured in the clashes which occurred almost daily for a number of weeks. The civilians on both sides of the controversy criticized the Police Department's handling of the situation. (District Court Opinion, Petitioners' Appendix at 42a-43a).

The majority of the police assigned to the site were members of the Tactical Force of the Patrol Division, headed by Inspector Thomas Critchley. After the Kawaida controversy had subsided, Deputy Chief Thomas Henry, head of the Patrol Division, transferred six members of the Tactical Force who had been on duty at the Kawaida

Towers site during the controversy. It was and is Gasparinetti's contention that these transfers were made because racially-motivated, political pressure was brought to bear on the Police Department by proponents of the Kawaida Towers project. This contention has been denied by Police Director Kerr and Police Chief Barres. As noted by Judge Lacey in his opinion, this is the "sole factual issue" in the controversy between the parties, and one which he found unnecessary to decide (District Court Opinion, Petitioners' Appendix at 43a).

On April 1, 1973, an article appeared in the Newark Star Ledger (Appendix at 1a). The article quoted Gasparinetti as saying, *inter alia,* that "the six police officers were transferred after alleged 'pressure brought on Police Inspector Thomas Critchley by Leroi Jones.'" (A black activist well known to the residents of Newark.) The article also quoted Gasparinetti as criticizing Inspector Critchley for succumbing "to political pressure and threats of Leroi Jones", and that in doing so Inspector Critchley was "operating outside the rules and regulations." Additional remarks made by Gasparinetti appeared in a Newark Star Ledger article dated April 4, 1973, (Appendix at 5a), and a P.B.A. Union Notice sent to the membership (Appendix at 4a). Subsequently, Inspector George Graf requested that Gasparinetti submit a report regarding his statements, and Gasparinetti responded in two letters dated April 16 and April 23, 1973. In those letters, Gasparinetti asserted the union contract between the P.B.A. and the City of Newark, stating that Graf's questions pertained to union matters and the request for such information violated the parties' collective bargaining agreement. Some five months later, allegedly as a result of these statements and letters, Gasparinetti was officially charged with violations of the Newark Police Department Rules and Regulations (Departmental Charges, Appendix at 8a-12a) as follows:

(I) Chapter 3:1.2-5 Derogatory Reference—

"Police Officers and civilian employees shall not by manner, gesture, or speech criticize or make derogatory reference to Department orders or instructions either to the public or to the members of the Department."

Gasparinetti allegedly violated this Chapter by making "a derogatory reference to the Department's orders and instructions by saying: 'That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by Leroi Jones', or words to that effect."

(II) Chapter 3:1.2-8 Censuring Official Transaction—

"Unless in accord with official duties, police officers and civilian employees shall not, either in writing or discussion, censure other Department members concerning official transactions within the Department."

Gasparinetti, according to the April 1, 1973 edition of the Newark Star Ledger, criticized Deputy Chief Thomas Henry and Inspector Thomas Critchley of the Newark Police Department concerning official transactions by making "the following unsubstantiated allegations."

"1. 'That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by Leroi Jones (Imamu Amiri Baraka)', or words to that effect.

"2. 'That Inspector Critchley was assigned to the Tactical Squad in order to break the morale and spirit of the men', or words to that effect.

"3. 'Wherein I will prove that Inspector Critchley and Deputy Chief Henry used deceit, lies and circumvented our labor contract to disgrace a number of very proficient police officers', or words to that effect."

(III) Chapter 6:7 Public Disparagement—

"Department members shall not publicly disparage or comment unfavorably or disrespectfully on the official action of a superior officer, nor on the Rules, Regulations, Procedures or Orders of the Police Department."

Gasparinetti allegedly violated this Chapter by publicly disparaging and commenting unfavorably and disrespectfully on the official actions of two superior officers, Deputy Chief Thomas Henry and Inspector Thomas Critchley, and on the Rules, Regulations, Procedures and Orders of the Police Department, in that he did say:

"1. 'When a man such as Critchley succumbs to political pressure and threats of Leroi Jones, then he is operating outside the Rules and Regulations', or words to that effect.

"2. 'The public wants to know why the police department doesn't do its job. Well, this is a very big part of the answer. We have the men who are willing to face the criminals but when they are led by, superiors like Critchley they hesitate', or words to that effect.

"3. 'We picketed to let people know we have cowards in superior officers ranks', or words to that effect."

(IV) Chapter 5:4.1 Obedience to Orders—

"Police officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer."

Gasparinetti allegedly violated this Chapter by failing to promptly and fully obey a lawful order directed to him by a superior officer, Inspector George Graf, to submit an "Administrative Submission" with his answers to the seven questions asked of him by the Inspector. Instead, Police Officer Gasparinetti had submitted a letter.

(V) Chapter 6:8 Acts of Insubordination—

> "Department members shall not commit acts of insubordination or disrespect to any superior officer. (As defined in Chapter 2:1.10 of the Rules and Regulations)."

Officer Gasparinetti allegedly violated this Chapter by committing alleged acts of insubordination and disrespect (as defined in Chapter 2:1.10 of the Rules and Regulations) when he "wilfully disobeyed" an order from Inspector George Graf, a superior officer, to submit an "Administrative Report" through channels with answers to seven questions asked him by the Inspector. The letter written by Gasparinetti in lieu of the "Administrative Report" was not accepted by the Police Department.

In April, 1974, before departmental hearings on the charges were conducted, Gasparinetti commenced an action in the District Court for the District of New Jersey under 42 U.S.C. §1983, claiming that the above-mentioned chapters of the Rules and Regulations facially, and as applied to him, violated rights guaranteed under the First and Fourteenth Amendments. Specifically, Gasparinetti sought injunctive relief against enforcement of all five chapters of the Rules and Regulations. He contended that the disciplinary hearings, if allowed to proceed, would inflict irreparable harm on the exercise of his First Amendment rights of freedom of speech and freedom of association. Additionally, he sought a declaratory judgment that Chapters 3:1.2-5 (Derogatory Reference), 3:1.2-8 (Censuring Official Transaction) and 6:7 (Public Disparagement) violate the requirements of due process under the Fourteenth Amendment in that they are vague and overbroad. (The complaint was subsequently amended to include P.B.A. Local No. 3 as a plaintiff as to the declaratory relief sought).

On April 23, 1974, Hon. Frederick B. Lacey, United States District Court Judge for the District of New Jersey, imposed a Temporary Restraining Order and executed an Order to Show Cause. The defendants were enjoined from proceeding with the hearing on the charges against Gasparinetti until further order of the court. The Temporary Restraining Order was subsequently continued by consent of the parties and briefs and affidavits were submitted. By agreement between the parties, no evidentiary hearing was held.

In the District Court's opinion, rendered in December, 1975, three threshold questions were decided in favor of Gasparinetti and P.B.A. Local No. 3. The Court found that (1) Gasparinetti was not required to exhaust his administrative remedies before seeking relief in the federal courts; (2) both Gasparinetti and P.B.A. Local No. 3 had the requisite standing to challenge the Rules and Regulations; and (3) the federal court ought not to abstain from deciding the issues presented. Additionally, the Court permanently enjoined enforcement of Chapter 3:1.2-5 (Derogatory Reference) and 3:1.2-8 (Censuring Official Tranaction), declaring both Rules to be facially overbroad. The vagueness question was not reached. The Court declined to grant declaratory relief as to Chapter 6:7 (Public Disparagement). Although the Court declined to grant the application for a permanent injunction as to the three other Rules under attack, the Court stayed

enforcement of those Rules pending the outcome of appeal.

Gasparinetti and P.B.A. Local No. 3 accordingly appealed the District Court's denial of injunctive relief as to Chapters 6:7 (Public Disparagement), 5:4-1 (Obedience to Orders) and 6:8 (Acts of Insubordination) and its denial of a judgment declaring Chapter 6:7 (Public Disparagement) unconstitutionally vague and overbroad.

The Court of Appeals affirmed the District Court's finding that Chapters 3:1.2-5 and 3:1.2-8 were unconstitutionally overbroad but reversed the District Court and held Chapter 6:7 unconstitutionally overbroad and vague. The Court of Appeals remanded to the District Court for a disposition of appellant's claims under Chapters 5:4-1 and 6:8.

POINT I

The Court of Appeals, consistent with this Court's decision in *Pickering v. Board of Education*, properly held Chapter 6:7 (Public Disparagement) of the Newark Police Department Rules and Regulations overbroad and vague and therefore violative of the Due Process Clause of the Fourteenth Amendment.

Contrary to the petitioners' contention, the Court of Appeals properly reversed the District Court and held that Chapter 6:7 (Public Disparagement) was unconstitutionally overbroad and vague (Petitioners' Brief at 7). The decision of the Court of Appeals is consistent with, and is mandated by, this Court's decision in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

In *Pickering*, this Court recognized that the State, as an employer, has an interest in regulating the speech of

public employees and enunciated a "balancing test" to weigh "the interests of [a public employee], as a citizen, in commenting upon matters of public concern and the interest of [a public employer] in promoting the efficiency of the public service it performs through its employees." *Pickering, supra* at 568. The threshold problem in determining the facial validity of Chapter 6:7 is whether or not it prescribes a reasonably discernable standard for applying the *Pickering* balancing test. In making this determination, the language of Chapter 6:7 must be evaluated in light of the closely related, but not identical, concepts of vagueness and overbreadth.

A. Chapter 6:7 (Public Disparagement) is unconstitutionally overbroad.

The concept of unconstitutional overbreadth is directed at government regulations "susceptible of sweeping and improper application." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963). As this Court stated in *Button*, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. This "specificity" is patently lacking in the department rule entitled "Public Disparagement". This rule is overbroad because the restraints placed upon what a police officer, specifically one who is also president of the P.B.A., may say on matters of public import are left to the discretion of the enforcing police department officials. As a result, the regulation in question here "sweep[s] far broader than necessary to advance the legitimate interests of the police department as an employer." *Flynn* v. *Giarrusso*, 321 F. Supp. 1295, 1300 (E. D. La. 1971).

In *Pickering*, this Court recognized the difficulty of formulating general standards to apply to all critical re-

marks by public employees and established criteria to aid in balancing the competing interests involved. This Court analyzed the statements made by the public employee in terms of whether the statements were made on a matter of legitimate public concern and whether the statements interfered with the performance of the employee's duties or the effectuation of the employer's mission. Surely, the statements made by Gasparinetti concerning the transfer of police officers related to a matter of "legitimate public concern."

Gaspartinetti's statements were made at a time when some 150 police officers were picketing Newark City Hall in protest of the tranfer of the six police officers (see Newark Star Ledger, April 1, 1973, Appendix at 1a). In light of this massive demonstration and the widespread expressions of dissatisfaction with departmental tactics, it cannot be seriously argued that Gasparinetti's remarks brought the issue into the public realm. The District Court in its opinion referred to the entire controversy as "intra-department strife" and as relating only to "police officers and police business" (District Court Opinion, Petitioners' Appendix at 54a). This characterization failed to recognize that the dispute resulted from a question of tremendous and undeniably legitimate public interest. The allegedly improper "public disparagement" by Gasparinetti involved his statements that political pressure had been exerted on the police department in effecting the transfers of the six officers (Appendix at 1a). The disputed transfers also related to the Kawaida Towers dispute, an ongoing controversy that was itself of great public concern at the time. If police officers can be sanctioned for public criticism of external interference with the police department, the public will not be adequately informed of such improper government functioning. *Cf. Pickering, supra* at 571-72.

In *Pickering,* this Court also took into consideration the fact that Pickering's remarks were not directed toward an immediate superior with whom he was in daily contact. That is also the situation in the case *sub judice.* Gasparinetti was not, is not, and in all likelihood never will be, assigned to the Newark Tactical Force (See District Court Opinion, Petitioners' Appendix at 44a). Therefore, his criticism of superior officers within that squad cannot be considered as having been directed against an immediate superior in violation of the *Pickering* caveat. In fact, Gasparinetti's only relationship with superior officers in that squad emanated from his role as P.B.A. President. Therefore, in this respect, Gasparinetti cannot be viewed in the same light as the plaintiff in *Pickering,* whose statements were not related in any way to labor union activities. See *Sprague* v. *Fitzpatrick,* 546 F.2d 560 (3rd Cir. 1976).

As President of the P.B.A., Gasparinetti is the principal spokesman designated by the 1300 rank and file members of the Newark Police Department to negotiate with the City of Newark in matters of wages, hours and other terms and conditions of employment. The transfer of six policemen who had been involved directly in the controversy surrounding the proposed construction of Kawaida Towers constitutes a term or condition of employment. Therefore, it is certainly a proper subject for criticism by Gasparinetti.

It is respectfully submitted that the *Pickering* balancing test was correctly applied by the Court of Appeals in its declaration that Chapter 6:7 imposes undue restrictions upon Gasparinetti in his role as President of the P.B.A. (See Court of Appeals Opinion, Petitioners' Appendix at 12a). As such, his statements were addressed not only to the interests of the six transferred policemen

and the P.B.A. as a collective bargaining agent but also to the interest of the public at large.

The *Pickering* test has been applied by other courts in striking down Police Department Rules and Regulations on grounds of overbreadth. In *Flynn* v. *Giarrusso, supra,* a New Orleans police officer was suspended for writing an article critical of the police administration in a police officers' union newsletter. The regulation upon which the disciplinary action was predicated was strikingly similar to the regulation at issue in the instant case. The rule was held unconstitutional because it subjected a police officer's speech "to the restraints of either prior approval by superiors or subsequent discipline, restraints which are left to the unfettered discretion of enforcing police officers." *Id.* at 1297. The Court commented that in the presence of such constraints, "we fail to see how an officer can exercise his First Amendment right rationally and intelligently." *Id.*

Similarly, in *Muller* v. *Conlisk,* 429 F. 2d 901 (7th Cir. 1970), a Chicago Police Department regulation which prohibited policemen from engaging in any activity, conversation or discussion derogatory to the department or its policies was challenged. Muller, a detective, failed to call to the attention of the Internal Inspection Division certain police practices which Muller knew to be illegal. In a later newspaper interview, when Muller was asked why he had not filed the charges with the Internal Inspection Division, he made defamatory remarks about the integrity of that branch of the Chicago Police Department. He was subsequently reprimanded and he later filed an action pursuant to 42 U.S.C. §1983. The Seventh Circuit affirmed the District Court's invalidation of the regulation as overly broad since it would, in effect, prohibit all criticism of the department by police officers.

The possibility of overly broad application of Chapter 6:7 is aptly demonstrated by the charges actually brought against Gasparinetti for statements made in his role as P.B.A. President. But, as recognized by the Court of Appeals (see Court of Appeals Opinion, Petitioners' Appendix at 12a), innocuous statements could fall within the proscriptions of Chapter 6:7, e.g., statements made during labor negotiations about the intractibility of management could well be described as "comment[ing] unfavorably . . . on the official action of a superior officer."

The Court of Appeals also recognized such important considerations as the fact that the P.B.A. President in an urban center such as Newark, be he Ronald Gasparinetti or any other individual, is a person sought after by the press on a variety of issues relating to the official business of the Newark Police Department—business such as the progress of contract negotiations with the City, which are also of legitimate concern to the P.B.A. and the public. Furthermore, a critical statement made at a union meeting might well be considered public for the purposes of preferring charges against a man under Chapter 6:7. Surely a union official's statements to the rank and file members concerning contract negotiations or terms and conditions of employment are constitutionally protected. Even the most innocuous statements made to the union members concerning the tenor of the relationship between management and labor which could frequently be expected to be critical, would be proscribed under the "Public Disparagement" rule (See Court of Appeals Opinion, Petitioners' Appendix at 12a).

In proscribing all public criticism of the police department by police officers, Chapter 6:7 clearly goes too far. The Court of Appeals properly held that it is unconstitutionally overbroad.

B. Chapter 6:7 is unconstitutionally vague.

This Court has held that a law will be adjudged violative of due process where it is set forth "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926).

Furthermore, courts scrupulously will search for unconstitutional vagueness where the regulation in question "operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961). See also *Ashton* v. *Kentucky,* 384 U.S. 195 (1966); *Winters* v. *New York,* 333 U.S. 507 (1948). Accordingly,

> ". . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147 (1959).

The requirement that laws regulating freedom of speech be drawn with a high degree of preciseness was the gravamen of *Winters* v. *United States, supra,* where this Court declared a statute that punished the circulation of printed material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime . . ." to be unconstitutional. (Subsection 2 of §1141 of the New York Penal Code).

Mr. Justice Reed stated:

> "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishments of incidents

> fairly within the protection of the guarantee of free speech is void on its face, as contrary to the Fourteenth Amendment. (Citations omitted.) A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions protected by the principle of the First Amendment, violate an accused's right under procedural due process and freedom of speech or press." *Id.* at 509-510 (1948).

The "Public Disparagement" rule is fatally vague on its face since it compels a police officer to conjecture as to the line of demarcation between permissible and proscribed conduct or speech. However definite the literal terms of this Rule may appear, it does not afford a policeman fair and adequate warning as to whether his contemplated conduct or speech violates this Rule. More specifically, it fails to give a president of a P.B.A., who frequently speaks on behalf of the members of the department, fair warning as to what kinds of comment will be declared in derogation of the rules. Consequently, the existence of a disciplinary regulation of seemingly unlimited scope has the effect of causing a P.B.A. president, or a rank and file police officer, to avoid any and all public comment for fear that what is said will be considered "disrespectful" or "unfavorable" and subject him to disciplinary charges that could result in suspension or dismissal from the Police Department. The interest of the public employer in proscribing public employee's speech in order to promot[e] efficient job performance (Petitioners' Brief at 8), cannot support a regulation that can effectively be construed to proscribe any public statement that is even mildly critical of the police department. The regulation clearly intrudes into areas of speech that are legitimately protected by the First Amend-

ment. The "Public Disparagement" rule in question is so vague, indefinite and uncertain that it must be condemned as repugnant to the basic requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As Justice Black stated in *Barenblatt* v. *United States,* 360 U.S. 109 (1959) (Black, J., dissenting):

> "[A] statute broad enough to support infringement of speech, writings, thoughts, and public assemblies . . . necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess leads people to forego the very rights the Constitution sought to protect above all others." *Id.* at 137.

Cf. *N.A.A.C.P.* v. *Button, supra; Smith* v. *California,* 361 U.S. 147 (1959); *Spriser* v. *Randall,* 357 U.S. 513 (1957).

POINT II

Chapters 3:1.2-5 and 3:1.2-8 of the Newark Police Department Rules and Regulations are unconstitutionally overbroad.

The District Court and Court of Appeals properly held Chapters 3:1.2-5 (Derogatory Reference) and 3:1.2-8 (Censuring Official Transactions) of the Newark Police Department Rules and Regulations unconstitutionally "overbroad". Under Chapter 3:1.2-5 a police officer in the City of Newark is subject to a broad and unrestricted prohibition against making any comment or gesture critical of the department's orders and instructions. Chapter 3:1.2-8 forbids a police officer from commenting unfavorably upon any member of the police department with respect to official transactions.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432-433 (1963). When faced with an overbreadth challenge a court must decide, first, if there is a legitimate and substantial state interest in regulating a class of speech, and if so, "whether that interest is being pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). The Rules prohibiting "Derogatory References" and "Censuring Official Transactions" sweep broadly into the realm of First Amendment rights of Newark police officers in general and Gasparinetti's in particular because of his status as president of the Newark P.B.A.

Chapter 3:1.2-5 (Derogatory Reference) completely prohibits a police officer in the City of Newark from rendering any criticism, either privately or publicly, of Police Department "orders or instructions". The effect of this prohibition as an impermissible restriction on the First Amendment right of free speech is illustrated by the types of comment and criticism which Chapter 3:1.2-5 forbids. This regulation does not distinguish between public and private speech of a police officer. *See Muller* v. *Conlisk,* 429 F. 2d 901 (7th Cir. 1970), *Magri* v. *Giarrusso,* 379 F. Supp. 353 (E.D. La. 1974); *Flynn* v. *Giarrusso,* 321 F. Supp. 1295 (E.D. La. 1971).

On its face Chapter 3:1.2-5 would allow the disciplining of a police officer in any of the following circumstances: where a police officer validly criticized and complained to a P.B.A. representative about an "order or instruction" he received; where a P.B.A. official (such as Gasparinetti) made a critical comment to the P.B.A. membership with respect to the police department's position in a grievance

relating to an "order or instruction" which the P.B.A. was processing under its collective bargaining agreement; or where, such as in the present case, a P.B.A. official was critical of the reason for the transfer of six police officers who were also members of the P.B.A. (See Counter-Statement of Facts at 3).

Chapter 3:1.2-8 (Censuring Official Transactions) suffers from the same constitutional infirmities. This regulation neither distinguishes nor differentiates between public and private speech. It completely prohibits a police officer from making any criticism, "either in writing or discussion" of other department members concerning official transactions. On its face, this regulation forbids a police officer from discussing with or writing to his P.B.A. representative, his attorney or the mayor about departmental transactions where censure of such members of the police department might be warranted. (See District Court Opinion, Petitioners' Appendix at 57a.)

Petitioners contend that Chapters 3:1.2-5 and 3:1.2-8 constitute allowable prohibitions of Gasparinetti's First Amendment rights because of the State's interest in the "effective discipline" and "morale" in the police department (Petitioners' Brief at 10). The Court of Appeals correctly recognized this governmental interest. (See Court of Appeals Opinion, Petitioners' Appendix at 11a). To promote these governmental interests a state may "regulate only with narrow specificity", *N.A.A.C.P.* v. *Button, supra* at 432-433, when fundamental personal liberties are involved. Chapters 3:1.2-5 and 3:1.2-8 do not conform with the requirement of regulation with "narrow specifity". Instead, these regulations provide for wholesale prohibitions on a police officer's and a P.B.A. president's speech which are not necessary for the promotion of the governmental interest. (See District Court Opinion, Petitioners' Appendix at 56a). With respect to the State's interest in fostering loyalty through these regulations the District Court correctly recognized that:

> "loyalty cannot be extracted from police officers, whether they are considered members of a quasi-military organization or not, by regulation which facially would negate first amendment rights to speak privately one's mind, and to work within the confines of the police hierarchy to seek correction of grievances." District Court Opinion, Petitioners' Appendix at 56a.

Gasparinetti was alleged to have violated Chapter 3:1.2-5 (Derogatory Reference) by stating that "that six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by Leroi Jones" (See Counter-Statement of Facts at 3). This statement, made by Gasparinetti as president of the P.B.A., related to the Kawaida Towers controversy which was a matter of great public interest and concern at the time. If Gasparinetti were to be disciplined for criticizing such alleged external interference with police department actions, this Court's concern for adequately informing the public of improper government functioning would not be achieved. *Pickering* v. *Board of Education, supra* at 571-572.

The same analysis, under *Pickering,* applies to the statements made by Gasparinetti which allegedly violate Chapter 3:1.2-8 (Censuring Official Transactions). These declarations also were in reference to Police Department improprieties of which the public should and must be informed.

A significant factor recognized by this Court in *Pickering* was that the statements of a public employee must be

examined in terms of whether or not they interfere with the performance of the employee's duties or the effectuation of his mission. *Pickering, supra* at 569-572. As noted in Point I, *supra,* with respect to Chapter 6:7, this Court, in *Pickering,* took into account the fact that the teacher's comments were not made in reference to an immediate supervisor. In the present case, Gasparinetti's comments related, not to an immediate supervisor, but were directed to the Newark Tactical Squad to which he was not assigned. (See District Court Opinion, Petitioners' Appendix at 44a).

In *Sprague* v. *Fitzpatrick,* 546 F. 2d 560 (3rd Cir. 1976), a case which petitioner contends is inconsistent with the Court of Appeals decision in the case *sub judice* (see Petitioners' Brief at 9), the court recognized that the key question under *Pickering* was whether the "employment relationship had been seriously impaired" by the public employee's statements. *Sprague, supra* at 566. In *Sprague* the court upheld the disciplining of a First District Attorney for criticizing his immediate superior, the District Attorney. The court noted that because there was, and had to be, a close working relationship between the two men that the criticism undermined the working relationship between them. *Sprague, supra* at 565. Clearly the circumstances in the present case are not the same, in that Gasparinetti's comments, as shown, were not directed at his immediate supervisor.

The proscriptions of Chapters 3:1.2-5 and 3:1.2-8 infringe greatly upon the First Amendment rights of both police officers and P.B.A. officials alike. As this Court has stated in a related context, "policemen, like teachers and lawyers, are not relegated to a watered down version of constitutional rights." *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967). With respect to policemen, similar broad

restrictions on First Amendment rights have been held unconstitutional. See *Muller* v. *Conlisk, supra,* and *Flynn* v. *Giarrusso, supra.* The regulations, while arguably designed to promote a proper governmental interest, impermissibly eliminate the "breathing space" which is necessary for the survival of First Amendment freedoms. *N.A.A.C.P.* v. *Button, supra* at 423-433. As such, the Court of Appeals and the District Court were correct in finding Chapters 3:1.2-5 and 3:1.2-8 unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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LAWRENCE A. WHIPPLE, JR.
Of Counsel and
On the Brief

FRANCIS J. VERNOIA
On the Brief

[APPENDIX FOLLOWS]

APPENDIX

Article, Sunday Star-Ledger, April 1, 1973

COPS TO PROTEST NEWARK TRANSFERS

Newark policemen will picket outside City Hall on Tuesday morning to protest the transfer of six policemen from the city's tactical squad.

Ron Gasparinetti, president of the Newark Policemen's Benevolent Association, Local No. 3, made the announcement after charging that the six police officers were transferred after alleged "pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imamu Amiri Baraka)."

As a result of the transfers, Gasparinetti said, PBA members would be outside picketing City Hall from 11 a.m. to 1 p.m. Tuesday.

Gasparinetti said Critchley was assigned to the tactical squad "in order to break the morale and spirit of the men."

He said that "when a man such as Critchley succumbs to political pressure and threats of LeRoi Jones, then he is operating outside the rules and regulations."

• • •

Meanwhile, Critchley dismissed the charges made by the PBA president, saying that Gasparinetti's allegations over the transfer of policemen were "ridiculous."

Last month, Baraka submitted a list of policemen's badge numbers and told Acting Police Director Edward Kerr that the policemen were responsible for the violence

Article, Sunday Star-Ledger, April 1, 1973

and harassment of blacks at the Kawaida Towers construction site in the city's North Ward.

Last Feb. 22, fighting occurred as representatives of Temple Kawaida, which is sponsoring the $6.4 million project, tried to lead a group of newsmen through a crowd of white opponents of the development and onto the construction site.

Following the incident, three police officers were injured and four blacks were arrested on various charges, including assault and battery on policemen.

• • •

Yesterday, Gasparinetti charged that the "citizens are being cheated when we have superiors that are afraid of the radical element in this city."

In reference to Critchley, the PBA president said: "This city is in the grip of fear, and appeasing the un-American-type people such as Jones is not the way to peace."

He said that "policemen are the leaders and officers of the people."

"It is their job to lead the people away from alien philosophy and promote the American way," he said.

He said the six transferred policemen—all of whom hold citations for various actions—are Patrolmen Charles Kniepher, Richard Giordano, James Dougherty, Joseph Curran, Nick Sapienza and Richard Schmalz.

• • •

Gasparinetti said:

> "LeRoi Jones threatened them and they paid no attention and now they have been disgraced in the eyes of their families and friends.

Article, Sunday Star-Ledger, April 1, 1973

> "The public wants to know why the police department doesn't do its job. Well, this is a very big part of the answer. We have the men that are willing to face the criminals but when they are being led by superiors like Critchley, they hesitate. None of these men have ever been on departmental charges."

Gasparinetti said the six transferred officers were the same ones Baraka charged with alleged brutality. He said the men have been transferred to various police precincts.

Deputy Police Chief Thomas Henry, who made the transfers, said the patrolmen were transferred because they were not functioning to his satisfaction in the tactical squad. He said the men were being sent to the patrol division.

• • •

In a related development, Newark City Council President Louis M. Turco urged Kerr in a letter "to refrain from making any transfer until further discussion is had . . . with the City Council."

Turco said he was "greatly disturbed" over the proposed transfer of Capt. Raymond Tenpenny from the East District.

In addition, the council president said "the business community through the 500 members of the Ironbound Manufacturers Association strongly oppose the transfer of Capt. Tenpenny."

Turco said "it appears that some of your proposed changes are unnecessary."

Kerr was unavailable for comment.

P.B.A. Union Notice Sent to Memembership

P. B. A.
UNION NOTICE

RON GASPARINETTI
President

JOSEPH CALABRESE
Recording Secretary

GASPARINETTI CHALLENGES ROX

Lt. Joseph Rox, Pres. of the Superior Officers Assoc. has seen fit to have another closed door hatchet session on the P.B.A. If he is really interested in the truth behind the "Critchley Affair", I challenge him to an open debate in front of all of the Superior Officers and all of the patrolmen of this department.

Wherein I will prove that Inspector Critchley and Deputy Chief Henry used deceit, lies, and circumvented our labor contract to disgrace a number of very proficient police officers.

Wherein I will also prove that this so-called representative of men, Lt. Rox, doesn't have the true grit to represent his own constituents when he let two lieutenants namely Lt. Curtiss and Lt. Corbit, go down the drain in this same affair.

Yet, when it comes to applying pressure to patrolmen, Lt. Rox becomes a lion.

RON GASPARINETTI
President

Articles, Newark Star Ledger, April 4, 1973

RANKING COPS ATTACK PBA IN NEWARK

The Superior Officers Association of the Newark Police Department issued a statement yesterday calling a recent criticism of a police inspector by the Patrolman's Benevolent Association president "irresponsible—(and) in violation of the constitution and by-laws of the PBA."

In its statement, the Officers Association said its "unanimously supports inspector Thomas J. Critchley in performing his duties," calling a PBA statement last week which was critical of him "an unprovoked irresponsible attack by (PBA President Ronald) Gasparinetti."

Gasparinetti claimed that the transfer of six officers from the city's tactical squad was the result of "pressure" brought upon Critchley by black nationalist leader Imamu Amiri Baraka.

• • •

He also claimed Critchley was assigned to the tactical squad to "break the morale and spirit of the men."

Gasparinetti led some 150 persons in a protest against the transfer of the officers in front of City Hall on Tuesday.

In a reply to Gasparinetti's charges, Critchley said:

> "If I had at any time had any information relative to improper tampering with the administration of the police department or any of its units by any persons or groups, I would not hesitate to bring such information to the attention of the prosecutor's office through the proper channels."

Articles, Newark Star Ledger, April 4, 1973

THEY LIKE US

Dear Sir:

After reading the recent issues of New Jersey's Finest, I felt a moral obligation to sit down and correspond with you.

Our local receives police newspapers from all over the country. They are very helpful to us in our negotiations and arbitration. I must admit my opinion of our paper was very low and I would have been one who would have voted against its existence. However, your recent editions changed my mind completely.

Let me congratulate you and your staff for a professional job well done. I have already sent copies to Chicago, Los Angeles, Las Vegas, Milwaukee, Detroit and Dade County, Fla. We here in Newark are proud to be affiliated with people of your caliber.

Ron Gasparinetti
President, Local 3
Newark.

HIGH RANKING COP REBUTS 'SMEARS' BY PBA LEADER

Newark Police Inspector Thomas J. Critchley charged yesterday he had been the victim of "smears and false charges" from the president of Newark Policemen's Benevolent Association, Local 3, during a dispute over the transfer of six policemen from the city's tactical squad.

Critchley said Patrolmen Ronald Gasparinetti, the PBA head, had "used lies and false charges to make a vicious personal attack on me."

Articles, Newark Star Ledger, April 4, 1973

"In this Gasparinetti openly joins the ranks of extremist groups and persons who have also used lies, smears and false charges against members of the tactical forces," Critchley asserted,

> "They have not been successful in their attempts to destroy the unit's effectiveness. Neither will Gasparinetti."

• • •

In the statement that prompted this reply. Gasparinetti claimed that the transfer of the officers to other assignments was the result of "pressure" brought on Critchley by black nationalist leader Imamu Amiri Baraka.

He claimed that Critchley was assigned to the tactical squad to "break the morale and spirit of the men."

In his reply, Critchley stated:

> "I am prepared to continue to meet my responsibilities. Gasparinetti should direct his time and effort toward his. If I had at any time had any information relative to improper tampering with the administration of the police department or any of its units by any persons or groups. I would not hesitate to bring such information to the attention of the Essex County prosecutor's office through the proper channels.
>
> "I strongly urge any police officer having any such information now or in the future to take the same course of action."

• • •

Meanwhile, Gasparinetti led approximately 150 persons in picketing of Newark City Hall yesterday to protest the transfer of the officers.

While Gasparinetti led the picketing, he said there would be no further protests over the transfers in the future.

> "We picketed to let people know we have cowards in superior officers ranks. But we'll walk away from here and that will be the end of it."

Newark Police Department Departmental Charges

POLICE DEPARTMENT

Newark, N.J., September 13, 1973

To the Honorable, the Police Director,

Sir:

I Hereby Charge
POLICE OFFICER RONALD GASPARINETTI
P. B. A. OFFICE
BUREAU OF SPECIAL ASSIGNMENTS

CHARGE I:

Violation of Newark Police Department Rules and Regulations, Chapter 3:1.2-5—DEROGATORY REFERENCE—Police Officers and civilian employees shall not by manner, gesture, or speech, criticize or make derogatory reference to Department orders or instructions either to the public or to other members of the Department.

SPECIFICATION: In a press release published in the Newark Star Ledger, April 1, 1973 and in an undated P. B. A. Newsletter to the membership, Police Officer Ronald Gasparinetti did make a derogatory reference to the Department's orders and instructions, in that he did, in an unsubstantiated charge say, That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imamu Amiri Baraka), or words to that effect.

CHARGE II:

Violation of Newark Police Department Rules and Regulations, Chapter 3:1.2-8—CENSURING OFFICIAL TRANSACTION —Unless in accord with official duties, police officers and civilian employees shall not, either in writing or discussion, censure other Department members concerning official transactions within the Department.

(THREE COUNTS)

SPECIFICATION: In a press release published in the Newark Star Ledger, April 1, 1973, also, in an undated P. B. A. Newsletter and P. B. A. Union Notice to the membership, Police Officer Ronald Gasparinetti did, censure other members of the Department, to wit: Deputy Chief Thomas Henry and Inspector Thomas Critchley, concerning official transactions within the Department in that he did make the following unsubstantiated allegations:

1. "That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imamu Amiri Baraka), or words to that effect.

2. "That Inspector Critchley was assigned to the Tactical Squad in order to break the morale and spirit of the men, or words to the effect.

3. "Wherein I will prove that Inspector Critchley and Deputy Chief Henry use deceit, lies, and circumvented

our labor contract to disgrace a number of very proficient police officers," or words to that effect.

CHARGE III:

Violation of Newark Police Department Rules and Regulations, Chapter 6:7—PUBLIC DISPARAGEMENT—Department members shall not publicly disparage or comment unfavorably or disrespectfully on the official action of a superior officer nor on the Rules, Regulations, Procedures or Orders of the Police Department.

(FIVE COUNTS)

SPECIFICATION: In a press release published in the Newark Star Ledger on April 1, 1973 and a quote published in the Newark Star Ledger on April 4, 1973, Police Officer Ronald Gasparinetti did publicly disparage and comment unfavorably and disrespectfully on the official actions of a superior officer, to wit: Deputy Chief Thomas Henry and Inspector Thomas Critchley, and on the Rules, Regulations, Procedures and Orders of the Police Department, in that he did say:

1. "That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imamu Amiri Baraka)," or words to that effect.

2. "Critchley was assigned to the Tactical Squad in order to break the morale and spirit of the men," or words to that effect.

3. "When a man such as Critchley succumbs to political pressure and threats of LeRoi Jones, then he is operating outside the Rules and Regulations," or words to that effect.

4. "The public wants to know why the police department doesn't do its job. Well, this is a very big part of the answer. We have the men that are willing to face the criminals but when they are led by superiors like Critchley they hesitate," or words to that effect.

5. In reference to the picketing in front of City Hall on April 3, 1973, he did say, "We picketed to let people know we have cowards in superior officer ranks," or words to that effect.

CHARGE IV:

Violation of Newark Police Department Rules and Regulations, Chapter 5:4.1—OBEDIENCE TO ORDERS—Police Officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer.

(TWO COUNTS)

SPECIFICATIONS:

1. On April 12, 1973, in the office of the Internal Affairs Division and in the presence of Lieutenant Robert Gauthier, Police Officer Ronald Gasparinetti did receive a lawful verbal order from Inspector George Graf, a superior officer, directing him to submit an "Administrative Submission": DPI:1001, through channels with his answers to the seven (7) questions asked of him by Inspector Graf, and he did wilfully disobey this order when he failed to comply as directed.

2. On April 23, 1973 in the office of the Internal Affairs Division, and in the presence of Lieutenant William Lissenden, Police Officer Ronald Gasparinetti, did receive a direct lawful verbal order from Inspector George Graf,

a superior officer to submit an "Administrative Report," not a letter, through channels, with his answers to the seven (7) questions asked of him by Inspector Graf on April 12, 1973, and he did wilfully disobey this order when he failed to comply as directed.

CHARGE V:

Violation of Newark Police Department Rules and Regulations, Chapter 6:8—ACTS OF INSUBORDINATION—Department members shall not commit acts of insubordination or disrespect to any superior officer. (As defined in Chapter 2:1.10 of the Rules and Regulations.)

(TWO COUNTS)

SPECIFICATIONS:

1. On April 12, 1973, Police Officer Ronald Gasparinetti did receive a lawful verbal order from Inspector George Graf, a superior officer, to submit a report through channels, relative to the seven (7) questions asked of him by Inspector Graf, and he did then, become insubordinate and disrespectful to him, when he did wilfully disobey this order, and failed to comply as directed.

2. On April 23, 1973, Police Officer Ronald Gasparinetti did receive a direct lawful verbal order from Inspector George Graf, a superior officer, to submit an "Administrative Report," not a letter, through channels, with his answers to the seven questions asked of him by Inspector Graf on April 12, 1973, and did then, become insubordinate and disrespectful to him, when he did wilfully disobey this order, and failed to comply as directed.

ANTHONY BARRES
Chief of Police